No. 14,959

In the

United States Court of Appeals

For the Ninth Circuit

American President Lines, Ltd., a corporation,
Appellant,

vs.

Marine Terminals Corp., a corporation,
Appellee.

Appellant's Opening Brief

Appeal from the United States District Court for the Northern District of California, Southern Division

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INDEX

Page

urisdictional Statement 1

tatement of the Case and Facts 2

pecifications of Error 8

ummary of Argument 10

rgument 12

I. Indemnity allowed for breach of stevedore's contractual obligation to perform work safely 12

A. Summary of Argument 12

B. Specification of Error No. 1 13

II. Indemnity also allowed where vessel unseaworthy and stevedore solely negligent 17

A. Summary of Argument 18

B. No Negligence of Shipowner 18

1. Specification of Error No. 2 18

C. Sole Negligence of Stevedore 19

1. Specification of Error No. 3 20

2. Specifications of Errors Nos. 4 and 5 24

D. Vessels Unseaworthiness and Stevedore Negligence Proper Basis for Indemnity 25

1. Specification of Error No. 6 25

III. Alternatively, negligence of shipowner does not bar indemnity where stevedore's negligence active and primary 27

A. Summary of Argument 27

B. Specifications of Error Nos. 7, 8 and 9 27

IV. Indemnity not contribution, still permitted under Halcyon v. Haenn and American Mutual v. Matthews 35

A. Summary of Argument 35

B. Specification of Error No. 10 35

Page

V. Findings of fact and conlusions of law conflict, are unsupported by the evidence, and do not support the judgment below 38

A. Summary of Argument 38

B. Specifications of Error Nos. 11, 12, 13, 14 and 15 39

Conclusion 44

TABLE OF AUTHORITIES

Cases — Pages

American Mutual Liability Insurance Co. v. Matthews, 182 F.2d 322 (2d Cir. 1950) 10, 11, 35, 37

American President Lines v. Marine Terminals Corp., 1955 A.M.C. 1879 ..... 34, 36

Babnick v. The Mt. Athos, 122 F. Supp. 68 (W.D. Wash. 1954) 18

Berti v. Compagnie etc., 213 F.2d 397 (2nd Cir. 1954) 26

Brown v. American-Hawaiian Steamship Co., 211 F.2d 16 (3rd Cir., 1954) 28, 30

Compagna Corporation v. Harrison, 114 F.2d 400 (7th Cir. 1940) 39

Crawford v. Pope and Talbot Inc., 206 F.2d 784 (3rd Cir. 1953) 27, 30, 36

Davis v. American President Lines, Ltd., 106 F. Supp. 729 30

Gray v. Boston Gas Light, 114 Mass. 149 (1892) 34

Halcyon Lines v. Haenn Ship Refitting Corp., 342 U.S. 282 (1952) 10, 11, 35, 36

Lukasiewicz v. Moore-McCormack Lines, 104 F. Supp. 572 (E.D. N.Y. 1952) 31

Lundberg v. Prudential Steamship Corp., 102 F. Supp. 115 (S.D. N.Y. 1951) 14

Mahnich v. Southern Steamship Co., 321 U.S. 96 (1944) 18

Mars, The, 9 F.2d 183, 184 (S.D. N.Y. 1914) 32

McFall v. Compagnie Maritime Belge (1952), 304 N.Y. 314, 328-332, 107 N.E. 2d 463, 471-473 ..... 28, 29

Caskin v. Victory Carriers, 124 F. Supp. 879 (E.D. Pa. 1953) .. 31, 33

Ryan Stevedoring Company v. Pan-Atlantic Steamship Corp., (..... U.S. ....., 100 L.ed. (Advance) page 146) 11, 13, 14, 15, 16, 17, 25, 27, 28, 30, 36

Pages

Seas Shipping Company v. Sieracki, 328 U.S. 85 (1946) 18

States Steamship Company v. Rothschild, 205 F.2d 253 (9th Cir. 1953) 12, 35, 37, 38

United States v. Armature Rewinding Co., 124 F.2d 589 (8th Cir. 1942) 39

United States v. Arrow Stevedoring Co., 175 F.2d 329, 331 (9 Cir. 1949) 31

United States v. Rothschild International Stevedoring Company, 183 F.2d 181 (9th Cir. 1950) 25, 32

Valerio v. American President Line, 112 F. Supp. 202 (S.D. N.Y. 1952) 26

Washington Gas Light Co. v. District of Columbia, 161 U.S. 316 (1896) 34

TEXTS

Restatement of Restitution, Section 97 31

Weinstock, "The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers", 103 U. of Pa. L. Rev. 321 (1954) 28, 37

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Jurisdictional Statement

This is an appeal from a judgment entered by the United States District Court for the Northern District of California, Southern Division, in favor of appellee Marine Terminals, Inc.

The complaint filed in the court below was for indemnity sought by appellant, American President Lines, Ltd., a Delaware corporation, against appellee, a Nevada corporation, in the amount of $62,500, representing the amount for which appellant became liable to and paid Robert B. Williams, an employee of appellee.

After trial Judgment was entered August 2, 1955 (Tr. 37).

Notice of appeal was filed August 30, 1955 (Tr. 38).

Cost Bond on Appeal was filed August 30, 1955 (Tr. 38-39).

Stipulation and Order Extending Time to File Record and Docket Appeal was filed October 7, 1955 (Tr. 40).

Designation of Contents of Record on Appeal was filed November 16, 1955 (Tr. 40-41).

Statement of Points on Appeal was filed December 2, 1955 (Tr. 300-303).

The District Court had jurisdiction pursuant to 28 USCA Sec. 1332 the action being based upon diversity of citizenship and the amount in controversy, exclusive of interest and costs, exceeding $3,000.

The Court of Appeals has jurisdiction to entertain this appeal pursuant to the provisions of 28 USCA Sec. 1291.

Statement of the Case and Facts

This is an action by American President Lines, Ltd., owner of the *SS President Polk,* appellant, against Marine Terminals Corporation, a stevedore company, appellee, for indemnity in the amount of $62,500.00 which was paid in settlement to Robert B. Williams, a longshoreman employed by appellee Marine Terminals Corporation, for injuries he sustained January 30, 1952, in the course of his duties aboard appellant's vessel, the *SS President Polk.*

Prior to the injury, appellant, steamship corporation, and appellee, stevedoring contractor, entered into a written contract (Exh. 16) for stevedoring services to be performed aboard appellant's vessels. Under this contract, the stevedoring company was engaged to perform loading and unloading operations aboard appellant's vessels in San Francisco Harbor and to remove beams and hatch covers. With

this contract appellee agreed to provide necessary stevedoring labor and supervision for the proper and efficient conduct of the work. Pursuant to this written contract, appellee stevedoring corporation was engaged in the performance of loading and discharging operations aboard the *SS President Polk* January 29 and 30, 1952.

When stevedoring operations aboard the *SS President Polk* commenced January 29, 1952, Gang No. 116, employed by appellee, boarded the vessel to discharge cargo from No. 1 hatch. The following day, on January 30, at approximately 9:30 or 10:00 A.M., Williams, as a member of Gang No. 116, was struck and severely injured by a falling hatch beam, which was dislodged by the bridle used to load drums into the hold.

Ernest Bleile, the walking boss for the defendant, Marine Terminals Corporation, was aboard the vessel on January 29, 1952, at which time the chief officer told him to keep his eyes open because he *believed* there were some beams aboard with no locks and that such beams should be removed to the deck (Tr. 289). Bleile then instructed the gangs at work to remove excess beams from No. 1 hatch and to place them on the deck. He also issued instructions to remove all unsafe beams (Tr. 289). Work continued that afternoon in the lower tween deck but the next morning, January 30, conditions were changed in the No. 1 hold when Gang No. 116 came aboard to uncover No. 1 lower hold and to load cargo into the lower hold beneath the beam in question (Tr. 113, 114, 129). The instructions were not repeated by Bleile, on this latter day, however (Tr. 293).

Gang No. 116, including Williams, commenced loading operations in the lower hold at 8:00 o'clock a.m. January 30 beneath this defective beam (Tr. 81, 112). The hatch square above the lower hold contains three sections of

hatch boards running fore and aft. The forward section between the forward edge of the hatchcoaming and No. 2 beam was removed by the longshoremen for the first time on the morning of January 30 to permit access to the lower hold (Tr. 57, 72, 113-115, 139, Exh. 2). No. 2 beam was partially exposed, revealing the missing locking device (Tr. 115, 116). The remaining sections of hatch boards were left in place. No cargo was placed on the remaining two sections of the hatch square, and these hatch boards and the beams upon which they rested, could have been removed had the longshoremen chosen to do so (Tr. 133, 173). None of appellant's personnel were shown to be in the area of No. 1 hold on the morning of January 30 prior to the accident (Tr. 81, 82, 166, 167, 189).

Gang steward, Edward Randolph, the man in the lower hold with Gang No. 116 primarily charged with the responsibility for safety (Tr. 111, 147, 292), noticed shortly after work began on January 30, that the port lock or safety latch was missing on No. 2 strongback in the lower 'tween deck (Tr. 115-116). He was concerned about this condition, which he admitted was an unsafe one, in view of the fact that loading operations were being conducted beneath this beam (Tr. 117-118). Edward Randolph, upon discovery of this condition, reported it to his gang boss, Rueben Swanson, and to his walking boss, Ernest Bleile (Tr. 117-121, 135). Swanson confirmed he was told by Edward Randolph that the locking device was missing on the port side of the hatch beam (Tr. 178-179) and that he recognized it constituted an unsafe condition, but he did nothing about it (Tr. 178). Instead, work continued in the face of the knowledge of this unsafe condition until the accident occurred (Tr. 180-181).

Romeo Paquette, a longshoreman with 33 years experience, was the winchman at the time of the accident, and

lternated with his partner Kellberg, the jobs of winchman nd hatchtender stationed at the side of the vessel next to he pier (Tr. 153-154, 170). Paquette testified that, in his xperience, the use of only one open section in a hatch quare presented too small an opening for the working of argo (Tr. 156). It was invariably his rule to protest small penings afforded by one section to the walking boss and o ask that another section be removed to permit a larger pening (Tr. 157). With the vessel down by the stern, the ridle, in its movements up and down through the hatch pening, swung toward the after end of the hatch so that it vould strike against the partially exposed unlocked No. 2 eam (Tr. 155, 156, 158).

Appellee's employees aboard the vessel were working in ccordance with the rules set forth in the Pacific Coast Maritime Safety Code. (Exh. 18) This Code provided, in part, as follows:

> "Rule 202. The employer shall provide, so far as the same shall be under his control, a safe working place for all operations.
>
> "Rule 204. The employer shall require the use of safe processes and practices.
>
> "Rule 205. The safety duties of the supervisory personnel, walking boss, ship and dock foremen, and assistant ship and dock foremen are:
>
> (a) To see that all working conditions are safe and that the gear is in apparent safe working condition during the operation.
>
> (c) To see that operations are carried on in a safe manner.
>
> (d) Where conditions warrant and he is not in immediate touch with his superintendent or other employer's representative, to stop the work if necessary to avoid accidents.
>
> "Rule 206. The safety duties of the hatch, dock, gang, or other group leader are:

(a) To be in direct charge of his gang or group and to see that all work is done in a safe manner.

(b) To report promptly to his foreman or walking boss or other employer representative on the job any defect in the gear or machinery or any unsafe working condition.

(d) In the event that he finds it impossible to get in touch immediately with his foreman or walking boss or other employer representative on the job, to himself stop the work upon discovery of any defective gear until his foreman or walking boss or other employer representative on the job shall have had an opportunity to pass upon the situation.

"Rule 207. The safety duties of the person designated as hatch tender or signal man are:

(a) To consider himself as the safety man for the gang, and for this purpose to cooperate with his foreman or walking boss or other employer representative on the job for the safety of the men during operations.

(e) To see that strongbacks adjacent to sections through which cargo is to be worked are locked, bolted, or otherwise secured before hoisting operations are started.

"Rule 824. The foreman or walking boss or hatch tender in charge of the hatch shall personally supervise the removal or replacement of hatch covers, strongbacks or beams.

"Rule 826. No cargo shall be worked through a section of a hatch unless the strongback of the adjacent section is bolted, locked or secured by other means."

These rules were known to Mr. Anderson, defendant's superintendent (Tr. 282), Ernest Bleile, the walking boss (Tr. 287); and to gang boss Swanson (Tr. 182), and gang steward Edward Randolph (Tr. 125), all of whom were employed by Marine Terminals Corporation to supervise generally operations aboard the vessel (Tr. 282, 287, 181-2,

111). The foregoing rules all pertain to the appellee Marine Terminals Corporation, and their employees.

Although gang boss Swanson knew that the missing lock presented a dangerous condition for those working in the No. 1 lower hold and although he had authority to do so (Tr. 293), no action was taken by him either to suspend operations or to insure that his superiors aboard the vessel were aware of the dangerous condition (Tr. 178-179, 181). Although the gang steward Randolph could have suspended loading operations in No. 1 lower hold (Tr. 293) the work continued under the defective beam (Tr. 131).

It would have taken from ten to twenty minutes to remove the defective hatch beam and the additional section of hatch boards resting on that hatch beam so that the hazardous condition would have been eliminated (Tr. 125-126, 161). Indeed, after the accident had occurred, this additional section was removed, resulting in no interference to unloading operations which were taking place in the lower tween decks of No. 1 hold (Tr. 143-144, 161, 174-175, Exh. 10).

At the time of the accident, Williams was engaged in handling drums which were lowered into the hold by a sling provided for that purpose. After unhooking two drums he attempted to steady the bridle, but the winchdriver hoisted it too fast (Tr. 54, 83). Romeo Paquette, the winch driver, who was actuating the empty sling upward saw the hook of the bridle catch under the flange of the strongback, lifting it out of its cleat or slot, then becoming disengaged and plummeting into the lower hold (Tr. 157-158). Williams was struck by this heavy strongback, and when he was found by James Randolph, his fellow worker, he was lying partially underneath the strongback severely injured.

Williams received benefits for a time under the Longshoremens and Harbor Workers Compensation Act, and then elected to sue the shipowner under the act's provisions. Treadwell & Laughlin, the attorneys then representing appellant defended this suit, and on January 16, 1953, the case was settled by the payment of $62,500.

No formal demand was made of appellee by appellant to defend the case brought against it by Williams, but appellee was notified by appellant's attorneys of the suit and the progress of negotiations (Tr. 245-248).

The present suit for indemnity was filed September 20, 1954, seeking recovery from appellee for $62,500, the amount of the settlement paid to Williams by American President Lines plus attorneys' fees and costs. The shipowner subsequently waived any right to recover attorneys' fees and costs. After trial, the lower court found negligence on the part of appellant shipowner and refused to grant indemnity for the settlement amount. Judgment in favor of stevedore appellee was entered August 2, 1955.

Specifications of Error

1. The Court erred in failing to find that the stevedoring contract under which appellee performed stevedoring services on appellant shipowner's vessel obligated appellee to remove hatch beams and to refrain from negligent acts or omissions which would impose liability upon appellant.

2. The Court erred in finding that the injury sustained by the longshoreman was incurred because of negligence on the part of appellant shipowner.

3. The Court erred in that the evidence was insufficient to support finding of fact No. 8 and erred in failing to find that the winch driver was negligent contrary to finding No. 8.

4. The Court erred in failing to find that appellee stevedore company and its employees failed to take proper precautions to suspend operations until the unsafe condition was corrected or to take any measures to insure that the dangerous condition was corrected by removing the defective beam and that appellee was grossly negligent and reckless in its failure to do so.

5. The Court erred in failing to find the walking boss, gang boss, gang steward and winchman employed by appellee continued with cargo operations in the face of a known dangerous condition in direct violation of the Pacific Coast Maritime safety code.

6. The Court erred in not finding that the injury sustained by the longshoreman arose from appellant shipowner's breach of its non-delegable duty to furnish the longshoreman a seaworthy ship and from appellee stevedore's sole negligence.

7. The Court erred in failing to find that even if appellant was negligent, the injury to the longshoreman was caused by an independent act of negligence on the part of appellee which supervened in time and became the active, primary or proximate cause of the injury.

8. The Court erred in holding that appellant's right to indemnity against appellee in the absence of an express contractual indemnity provision is allowable only in the event the former fails to perform its non-delegable duty to furnish a seaworthy ship.

9. The Court erred in holding that appellant's right to indemnity against appellee stevedore in the absence of an express contractual indemnity provision is not allowable where appellant's negligence was inactive or passive and appellee's negligence was the active or primary cause.

10. The Court erred in conclusion of law No. 5 in applying the law of *American Mutual Liability Insurance Co. v. Matthews,* 182 F.2d 322 (2d Cir. 1950), and *Halcyon Lines v. Haenn Ship Refitting Corp.,* 342 U.S. 282 (1952) to the facts of this case.

11. The Court erred in that conclusion of law No. 4 conflicts with finding of fact No. 12.

12. The Court erred in that the findings of fact are insufficient to support conclusion of law No. 4.

13. The Court erred in that conclusions of law Nos. 1, 2, 4, and 5 are inconsistent with finding of fact No. 12 and are not supported by the evidence or any finding of fact.

14. The Court erred in that there is no evidence or finding to support conclusion of law No. 2, that the appellant shipowner knowingly supplied or knew that a particular hatch beam lacked a locking device.

15. The Court erred in that the findings of fact are insufficient to support conclusions of law Nos. 1 and 2 that plaintiff and defendant were jointly and concurrently negligent and said conclusions are contrary to the findings of fact.

Summary of Argument

I. Indemnity Allowed for Breach of Stevedore's Contractual Obligation to Perform Work Safely.

The Court erred in failing to find that the stevedoring contract under which appellee stevedoring corporation was engaged in stevedoring operations, obligated appellee to refrain from negligent acts or omissions amounting to a breach of its warranty of workmanlike service to perform its work in a safe and proper manner. Indemnity should be awarded appellant for the breach of appellee's contractual duty based on the recent Supreme Court case of *Ryan*

Stevedoring Co. v. Pan Atlantic S.S. Corp. (Brief Section I, Specification of Error No. 1).

I. Indemnity Also Allowed Where Vessel Unseaworthy and Stevedore Solely Negligent.

Even if the basis for appellant's recovery, stated in Section I above is not recognized, appellant American President Lines was liable to the employee longshoreman Williams solely by virtue of its absolute duty to supply a seaworthy vessel and a safe place in which to work and was without negligence. The cause of the accident was the sole negligent conduct of appellee stevedore company, and on this basis indemnity should be awarded in favor of appellant shipowner. In this connection, the trial court also failed to find, and should have found, that appellee's walking boss, gang boss, gang steward and winch driver were negligent and violated the Safety Code (Brief Section II, Specifications of Error Nos. 2, 3, 4, 5 and 6).

II. Alternatively, Negligence of Shipowner Does Not Bar Indemnity Where Stevedore's Negligence Active and Primary.

Even if appellant was guilt of some negligence, that negligence was of the passive or secondary sort. The negligence of the stevedore was the active, primary, and proximate cause of the accident which resulted in Williams' injury. Based upon recognized principles of common law, indemnity recovered should be awarded in favor of appellant shipowner (Brief Section III, Specifications of Error Nos. 7, 8 and 9).

V. Indemnity, Not Contribution, Still Permitted Under Halcyon v. Haenn, and American Mutual v. Matthews.

The principles enunciated in the cases of *Halcyon Lines v. Haenn Ship Refitting Corp.* and *American Mutual Lia-*

bility Insurance Co. v. Matthews, relied upon by the trial court in its conclusions of law do not support the conclusions reached therein, but to the contrary support recovery by appellant in its suit for indemnity. Further, *States Steamship Co. v. Rothschild International Stevedoring Co.* relied upon by the trial court does not foreclose recovery by appellant (Brief Section IV, Specification of Error No. 10).

V. Findings of Fact and Conclusions of Law Conflict, Are Unsupported by the Evidence, and Do Not Support the Judgment Below.

Conclusions of Law 1, 2, and 5, all to the effect that appellant was jointly and concurrently negligent with appellee, and that appellant knew of the particular defective beam and the progress of work thereunder, and Conclusion of Law No. 4 that appellant's concurrent negligence went well beyond a mere passive act of negligence, are unsupported by evidence or by any findings of fact. Said conclusions are further inconsistent with Findings of Fact Nos. 3, 4, and 5 and conflict with Finding No. 12 (Brief Section V, Specifications of Error Nos. 11, 12, 13, 14 and 15).

Argument

I.

INDEMNITY ALLOWED FOR BREACH OF STEVEDORE'S CONTRACTUAL OBLIGATION TO PERFORM WORK SAFELY

A. Summary of Argument.

The Court erred in failing to find that the stevedoring contract under which appellee stevedoring corporation was engaged in stevedoring operations obligated appellee to refrain from negligent act or omissions amounting to a

breach of its warranty of workmanlike service to perform its work in a safe and proper manner. Indemnity should be awarded appellant for the breach of appellee's contractual duty based on the recent Supreme Court case of *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*

3. Specification of Error No. 1.

> "The Court erred in failing to find that the stevedoring contract under which appellee performed stevedoring services on appellant shipowner's vessel obligated appellee to remove hatch beams and to refrain from negligent acts or omissions which would impose liability upon appellant."

It is by now well recognized that a claim based upon an express indemnification provision in a stevedoring contract running between the stevedore and the shipowner affords a proper basis for relief. However, the absence of an express indemnity clause does not indicate that such an action must fail.

The trial court below, in denying indemnity, did so without reference to the obligations of the parties under the stevedoring contract between shipowner-appellant and stevedore contractor-appellee. The trial court found, however, that such a contract was in force (Finding of Fact No. 1 (Tr. 32).

Under the terms of this contract, it was provided:

> "2-b. *Provide* all necessary stevedoring labor, including winchmen, hatchtenders, tractor and fork-lift operators, foremen, and *such other stevedoring supervision as are needed for the safe and efficient conduct of the work* and for the vessel's utmost despatch.
>
> "2-c. Adjust rigging of booms, guys and other ordinary cargo tackle at hatches where work of discharging and/or loading will be conducted as required in the operation, and readjust when completed. *Remove* and replace *beams, hatch covers* and tarpaulins." (Italics ours)

The contract in force between the stevedore and the shipowner provides the basis for the claim of indemnity which is founded upon express or implied obligations arising thereunder.

The stevedore contract here under consideration provides, as is usual in situations of this character, that the stevedore contractor shall perform loading and discharging services about the vessel. This, of course, involves various incidental duties, such as removing and replacing hatch covers, hatch beams, and the like, to gain access to the cargo holds. The agreement provides expressly that such duties will be safely performed. Even in the absence of such expression in the contract it would normally be implied. *Lundberg v. Prudential Steamship Corp.,* 102 F. Supp. 115 (S.D. N.Y. 1951).

Subsequent to the entry of judgment in the present case, the Supreme Court decision in *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corp.* was rendered (..... U.S. ....., 100 L.ed. (Advance) page 146). This case represents somewhat of a departure from the welter of decisions, dealing with the problem of the relationships between the stevedore employer and the shipowner, where an employee of the stevedore employer is injured while working aboard shipowner's vessels. This case held that a stevedore contractor who agrees to perform the shipowner's stevedoring operations, thereby assumes the obligation, not only to do the work contracted for, but to do its work properly and safely, and this latter obligation is of the essence of a stevedore's contract. It is the warranty of workmanlike service comparable to a manufacturer's warranty of the soundness of its manufactured product. For breach of this obligation, recovery is permitted on an indemnity theory.

In the *Ryan* case, it is stated as follows, 100 L.ed. (Advance) pages 152, 153:

"The shipowner here holds petitioner's uncontroverted agreement to perform all of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded. That agreement necessarily includes petitioner's obligation not only to stow the pulp rolls, but to stow them properly and safely. Competency and safety of stowage are inescapable elements of the service undertaken. This obligation is not a quasi-contractual obligation implied in law or arising out of a noncontractual relationship. It is of the essence of petitioner's stevedoring contract. It is petitioner's warrant of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product. The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service. * * * Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach."

The facts of the instant case clearly show a breach of the arranty by the stevedore employer under its contract. he removal of hatch boards and beams is essential to load-g and unloading cargo aboard a merchant vessel, and deed the stevedoring contract specifically provided that e responsibility rested with the stevedore for removal and eplacement of the same (Exh. 16, Sec. 2(b)). That the ngshoremen employees of appellee breached their war-nty of safe and workmanlike service (Exh. 16, Sec. 2(a))

is manifest from the record. We refer to the imposing chain of events which made this unfortunate accident inevitable after the stevedore, on the morning of January 30, 1952, discovered a lock was missing from #2 beam in #1 lower tween deck. The failure of walking boss Bleile to insure that defective beams were removed, the failure of the winch-driver, Paquette, to prepare a suitable opening for cargo operation in the lower tween deck for the cargo hook and bridle (Tr. 156, 157) and in lifting or raising the hook before it was steadied below (Tr. 54-55, 83, 156); the extraordinary conduct of gang steward Edward Randolph in failing to take any precautions either to remove, or to suspend operations (Tr. 292-294) in the face of a known peril actually recognized by him, the failures of walking boss Bleile and gang boss Swanson to take any action for the safety of the men committed to their charge, knowing of the dangerous condition. The actions of each represents a clear violation of the stevedore's contractual obligation. Taken collectively, the cumulative effect offers conclusive proof of a substantial breach of the stevedore's warranty. The stevedore's activities in performing under this contract resulted in an injury to Williams under circumstances which the stevedore might reasonably have suspected or known would have imposed liability upon American President Lines for the injuries so caused.

We submit that, for the foregoing reasons alone, error was committed by the court below under Specification of Error No. 1 in failing to find a breach of the stevedore's contractual warranty.

The recent *Ryan* case, we believe, effectively establishes appellant's right to recover. When the contractual relationship between the stevedore employer and the shipowner exists and a breach of the stevedore's obligations is shown,

hat breach should be held to impose liability without refer-
ence to the relative responsibilities of the parties for the
ort.

If however, for any reason, this court should choose to
ely upon the case law as it existed prior to the decision in
Ryan, there are equally compelling reasons obtaining here
o reverse the judgment of the trial court and award indem-
nity to appellant. The Supreme Court, in reaching the
esult of the contractual theory of indemnity, did so ex-
pressly leaving open the question of common law indemnity
liscussed in the cases prior to its decision (100 L.ed. Ad-
vance p. 152). Thus, even aside from the *Ryan* basis of
ecovery the record before this court demonstrates that
based on either unseaworthiness of the ship (Sec. II, Brief)
or a comparison of fault and negligence as between ship-
owner and stevedore (Sec. III, Brief) indemnity will lie.

II.

INDEMNITY ALSO ALLOWED WHERE VESSEL UNSEAWORTHY AND STEVEDORE SOLELY NEGLIGENT

A. Summary of Argument.

Even if the basis for appellant's recovery stated in Section I above is not recognized, appellant American President lines was liable to the employee longshoreman Williams solely by virtue of its absolute duty to supply a seaworthy vessel and a safe place in which to work and was without negligence. The cause of the accident was the sole negligent conduct of appellee stevedore company, and on this basis indemnity should be awarded in favor of appellant shipowner. In this connection, the trial court also failed to find, and should have found, that appellee's walking boss, gang boss, gang steward and winch driver were negligent and violated the Safety Code.

It is conceded that American President Lines owed to Williams a non-delegable duty to supply a seaworthy ship. That American President Lines was liable to the injured stevedore is unquestioned. The fact that the safety latch, an integral part of the beam, was missing constitutes failure on the part of appellant to supply a seaworthy vessel. Such liability is absolute and not based on any concept of negligence.

Mahnich v. Southern Steamship Co., 321 U.S. 96 (1944);

Seas Shipping Company v. Sieracki, 328 U.S. 85 (1946);

Babnick v. The Mt. Athos, 122 F. Supp. 68 (W.D. Wash. 1954).

B. No Negligence of Shipowner.

1. SPECIFICATION OF ERROR NO. 2.

"The Court erred in finding that the injury sustained by the longshoreman was incurred because of negligence on the part of appellant shipowner."

The conclusion that negligence is attributable to appellant American President Lines has to be based upon the following two findings: Finding of Fact No. 4, that plaintiff knew and was aware of the absence of locking devices on *some* of the strongbacks on the vessel. This finding, together with Finding of Fact No. 5, sets forth that a warning "*some* beams board the vessel might lack locking devices" was communicated by the chief officer of the vessel to walking boss Ernest Bleile. Findings No. 4 and No. 5 are based solely upon the testimony of Ernest Bleile. The testimony on this point was brief. The pertinent portions appear below (Tr. 289):

"A. (by Ernest Bleile) I had a conversation, during the conversation he (Chief Officer Hogan) mentioned to me that he would like me to remove all excess beams what I didn't use for handling cargo, because he had some beams on the ship which had faulty locking devices.

Q. Just what did he say to you, using his exact words, with reference to the condition of these beams, as best you recall?

A. He called me below. He said, 'Will you keep your eyes open? I believe I have strong backs here which have no locks.' * * *."

Findings of Fact No. 4 and No. 5 have support from the testimony only to the extent of a belief on the part of the chief officer of the vessel that he had some strongbacks aboard the vessel which lacked locking devices. Conclusion of Law No. 2 specifically determines that there was concurrent negligence on the part of the shipowner for "knowingly supplying a beam with a defective device". But it will be noted there is no finding that plaintiff knew of the missing device on No. 2 king strongback. There was no evidence of such knowledge and no such knowledge can be imputed to the shipowner. (We will hereafter in Section V discuss the conflict between the Findings of Fact 3, 4 and 5 and the unsupported Conclusion of Law No. 2 that the shipowner knowingly supplied a beam with a defective lock.) The evidence supports only the *belief* of Hogan there were some strongbacks aboard without locks and that this belief was communicated to Ernest Bleile, walking boss of appellee, and such evidence cannot be strained to support a finding that the shipowner was aware that the particular beam in question was unsafe or that it lacked a locking device. There is no evidence that any of the shipowner's employees were present in the vicinity of loading operations at No. 1 hold,

and appellee's employees who were at that position could not recall that any ship's officers or other employees of appellant were present during the course of loading or discharging operations (Tr. 81, 82, 166, 167, 189). There is no basis on which the court could assume that there was an awareness on the part of appellant or its employees that No. 2 strongback constituted a peril for the men working below. There is not a shred of testimony in the record to show knowledge of the shipowner or officers of the perilous condition obtaining in No. 1 lower hold while appellee continued with its work.

C. Sole Negligence of Stevedore.

1. SPECIFICATION OF ERROR NO. 3.

> "The Court erred in that the evidence was insufficient to support finding of fact No. 8 and erred in failing to find that the winch driver was negligent contrary to finding No. 8."

This is in addition to other faults of stevedore appellee hereinafter outlined.

Finding of Fact No. 8 is as follows:

> "8. That the winch driver, Mr. Paquette, had prior to, and at the time of the dislodgment of said hatch beam, been using operating and manipulating the bridle and hook in the usual and customary manner and free of any negligence whatsoever."

We submit this finding of fact is clearly erroneous, is not supported by, and is contrary to, the evidence. Paquette did not approve of the procedure utilized on this occasion, wherein only one section of the hatch square in the lower tween deck, No. 1 hold, was open during stevedore operations (Tr. 156-157). Paquette testified that with one hatch section open, there was not enough room for the cargo bridle

with its hook to move up and down without hitting obstructions (Tr. 156). In fact, with the ship down by the stern, as in this case, the chances that the bridle and hook would strike the No. 2 strongback were greatly increased (Tr. 158). His practice was to remove, wherever possible, more than one section of the hatch boards to facilitate loading or discharging operations (Tr. 157, 158, 159). An extra hatch section could have been removed without any detriment to stevedoring operations resulting had the stevedores chosen to do so (Tr. 133, 173-5 Exh. 10). Paquette's reasons for failing to remove an extra section of the hatch square were set forth at page 157 of the transcript as follows:

> "A. (by Paquette) Normally if the thing is safe and everything—sometimes we can't take two sections off—they have cargo on top of the hatches.
>
> Q. If it is unsafe, what do you do?
>
> A. If it is unsafe, the boys underneath is the ones that are working. Those strong backs aren't going to hit me on top there.
>
> Q. You leave it up to the boys underneath to request it?
>
> A. Yes. If they say remove it, we remove it."

Thus the record indicates a recognition on the part of Paquette of the peril created by conducting discharging operations with but one hatch square section open, yet a callous disregard on his part from his position of safety of the dangers to which those below were exposed. It should be noted, too, that Paquette alternated with his partner Kellberg in acting as hatch tender at the side of the vessel. Safety Rule No. 207 specifically required the hatch tender to consider himself as safety man for his gang and "to see that strongbacks adjacent to sections through which cargo is to be worked are locked, bolted, or otherwise secured before hoisting operations are started". In addition,

Rule 824 provides: "The foreman or walking boss or hatch tender in charge of the hatch shall personally supervise the removal or replacement of hatch covers, strongbacks or beams." It appears that Paquette simply failed to concern himself with the dangers facing the men below or to observe either the rules or a standard of reasonable care with respect to safety operations in No. 1 hold.

There was strong and convincing evidence, by the above uncontroverted testimony, to demonstrate that he failed negligently to insure the safety of the men in his charge working in the lower hold who were threatened by the movement of the bridle. The evidence also shows negligence on the part of Paquette in the manipulation of the bridle. Williams' testimony was to the effect that after unhooking the two drums he tried to steady the bridle (to keep it from swinging) but was unable to do so because the bridle was hoisted out of his reach. There is no question but that the bridle should have been steadied before it was raised, but in this case it was raised too fast—because the winch driver "sat back on the levers". The following excerpts from the testimony of Paquette and Williams are enlightening.

Paquette (Tr. 156):

> "Q. Was the bridle opposite Number 2 strong back?
>
> A. What do you mean, opposite Number 2?
>
> Q. Did you actually see it swing against Number 2 strong back?
>
> A. It swings all the time. Every load it swings.
>
> Q. Why does it swing?
>
> A. Why? Because a lot of times the boys don't steady it. Sometimes the winches go a little faster, sometimes faster than others, and it gives a little swing, and when you are working in one section, a little swing one foot one way or the other, you don't have much space in there."

Williams (Tr. 54-55):

"Q. Will you tell the Court what happened at the time you were injured?

A. I myself proceeds to unhook the two drums that had been lowered into the lower hold of the President Polk, No. 1 hatch. I attempts to steady the bridle. The winch driver sits back on the levers. He goes ahead, and before I know anything the hook that is on that cable hooked into the beam, and before I knew anything the beam had struck me.

Q. When you said the hatch driver goes ahead, you mean he raised the bridle?

A. After the bridle had been released from the two drums."

Williams (Tr. 83):

"Q. I believe you said this morning that the sling started to move and you attempted to steady it, is that right?

A. Yes.

Q. How did you attempt to steady the sling after the bridle had been unhooked?

A. With one hand, sometimes two.

Q. At that time were you using one hand or two hands to steady it?

A. That particular morning?

Q. Yes.

A. I can't recall whether I used two or one.

Q. In any event—

A. I attempted to check the swing.

Q. The sling was on its way up, is that right?

A. Yes.

There is not one word of testimony to support Finding of Fact No. 8 and, as shown above, the evidence is to the contrary.

2. SPECIFICATIONS OF ERROR NOS. 4 AND 5.

"The Court erred in failing to find that appellee stevedore company and its employees failed to take proper precautions to suspend operations until the unsafe condition was corrected or to take any measures to insure that the dangerous condition was corrected by removing the defective beam and that appellee was grossly negligent and reckless in its failure to do so." (Specification of Error No. 4.)

"The Court also erred in failing to find the walking boss, gang boss, gang steward and winchman employed by appellee continued with cargo operations in the face of a known dangerous condition in direct violation of the Pacific Coast Maritime safety code." (Specification of Error No. 5.)

Sometime prior to the accident, either on January 29 or January 30, work was suspended during cargo operations to permit the movement of drums away from a dangerous and exposed position above No. 1 lower hold (Tr. 119, 182-184, 291). These drums had been stowed in the wings of the lower tween deck and so close to the hatch coaming that they were in danger of falling into the lower hold below (Tr. 120, 132, 133). Work was suspended while these were removed to a safer location. This took 45 minutes to an hour to accomplish (Tr. 291). Had a similar suspension of work for approximately 10 to 15 minutes been taken for removal of the defective hatch beam, the unfortunate accident to Williams would not have occurred.

The negligence of the stevedore in other respects was also clear. The same factors which point up the breach of the stevedore's contractual duty to perform work in a reasonably safe prudent manner as outlined under Section I of this brief also establish the gross negligence and carelessness of appellee stevedore company.

Specifically the testimony shows violation by supervisory personnel Anderson, Bleile and Swanson of Rule 205 to see that working conditions were safe, and gear in proper order, and to stop work to avoid accidents; a violation by hatch-tenders Kellberg and Paquette of their obligations under Rule 207; a violation by Bleile and Swanson of Rule 824—and a violation by Randolph and Swanson of Rule 826.

The court below in part supports our contention by Finding of Fact No. 12, which provides that the defendant stevedore company "continued to work with the knowledge of the dangerous condition of the defective strongback" (Tr. 34).

D. Vessels Unseaworthiness and Stevedore Negligence Proper Basis for Indemnity.

1. SPECIFICATION OF ERROR NO. 6.

> "The Court erred in not finding that the injury sustained by the longshoreman arose from appellant shipowner's breach of its non-delegable duty to furnish the longshoreman a seaworthy ship and from appellee stevedore's sole negligence."

Since the vessel here was unseaworthy, but without a showing or any proof of negligence on appellant shipowner's part, and since the appellee stevedore was clearly negligent and proceeded to work the hold with full knowledge of the danger, the Court below, even by disregarding the *Ryan* theory of recovery and even disregarding the principles established by *U. S. v. Rothschild,* 183 F.2d 181 (9th Cir. 1950) (hereinafter discussed under Section III of this Brief) should have granted indemnity. In other words, even if the Court correctly interpreted the law as allowing indemnity only where the stevedore was liable to an injured longshoreman without fault on its part or for breach of its

non-delegable duty to furnish a seaworthy ship, recovery over should have been allowed because the shipowner here was liable only for unseaworthiness without negligence on its part and because the injury resulted from the independent negligence of the stevedore.

The obligation of a shipowner to the injured longshoreman here was based upon the theory of liability without fault expressed as the obligation to supply a seaworthy ship and a safe place in which to work. Negligence on the part of appellant simply was not proven at the trial. In this connection, *Valerio v. American President Line,* 112 F. Supp. 202 (S.D. N.Y. 1952) is instructive. In that case, the employees became infected by contact in unloading a cargo of cashew-shell oil. The oil had leaked from the drums to the decks and cargo hooks. This cargo was known to be hazardous, requiring special precaution. The court held the shipowner's duty to furnish a safe place to work and to warn of the dangers of handling this cargo was non-delegable, for the breach of which the shipowner was liable. The court also found, however, that the employer had contracted with the shipowner to perform the duty; i.e., to warn, to provide proper supervision, and to furnish gloves and salves, and that this breach of contract was the "primary cause" of the injuries giving rise to the shipowner's right of full indemnity.

The case of *Berti v. Compagnie etc.,* 213 F.2d 397 (2nd Cir. 1954), also illustrates this line of cases. There the court considered a contract almost identical with the contract presently before this court. The Court of Appeals for the Second Circuit held that indemnity over was recoverable where the stevedore's negligence was the sole, active, or primary cause, even where defective equipment was supplied by the shipowner. The court said, at page 401 :

"American * * * was fully aware of the condition of the ship's equipment and failed to take proper precautions. Hence, on this showing, American's fault was primary, and on the record now before me, Compagnie was legally entitled to indemnity for any judgment which plaintiff might ultimately recover."

Accord:

Crawford v. Pope and Talbot Inc., 206 F.2d 784 (3rd Cir. 1953).

III.

LTERNATIVELY, NEGLIGENCE OF SHIPOWNER DOES NOT BAR INDEMNITY WHERE STEVEDORE'S NEGLIGENCE ACTIVE AND PRIMARY.

.. Summary of Argument.

Even if appellant was guilty of some negligence, that egligence was of the passive or secondary sort. The neglience of the stevedore was the active, primary, and proximate cause of the accident which resulted in Williams' ıjury. Based upon recognized principles of common law ıdemnity recovery should be awarded in favor of appelınt shipowner.

Assuming for the purposes of argument that the conractual indemnity principle of the *Ryan* case is inappliable, and further assuming that the Court below did not rr as set forth in Section II of this brief, and further ssuming that the ship was not only unseaworthy but that ppellant shipowner was also guilty of negligence, indemity should still be awarded under the circumstances of this ase.

. Specifications of Error Nos. 7, 8 and 9.

"7. The Court erred in failing to find that even if appellant was negligent, the injury to the longshore-

man was caused by an independent act of negligence on the part of appellee which supervened in time and became the active, primary or proximate cause of the injury.

"8. The Court erred in holding that appellant's right to indemnity against appellee in the absence of an express contractual indemnity provision is allowable only in the event the former fails to perform its non-delegable duty to furnish a seaworthy ship.

"9. The Court erred in holding that appellant's right to indemnity against appellee stevedore in the absence of an express contractual indemnity provision is not allowable where appellant's negligence was inactive or passive and appellee's negligence was the active or primary cause."

It was pointed out in the *Ryan* case that although reliance could be placed upon a contractual obligation nevertheless in previous cases decided in the lower courts, liability for indemnity had hinged on the terms of the relative responsibility of the parties for the tort and such courts dealt with concepts of primary and secondary or active and passive tortious conduct. See, for example, *Brown v. American-Hawaiian Steamship Co.,* 211 F.2d 16 (3rd Cir., 1954); *McFall v. Compagnie Maritime Belge,* infra; *Weinstock, "The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers",* 103 U. of Pa. L. Rev. 321 (1954). This law review article prefaces its discussion and analysis of cases on the subject with the following remarks at p. 323:

"However, if the shipowner is liable to the employee, as for negligence or failure to furnish a safe place to work, or even liable without fault for breach of warranty of seaworthiness, there may be an accompanying fault[10] on the part of the employer. There may be two causes which are concurrent; or they may be succes-

sive, in point of time, under circumstances which will call forth a judicial finding that one is 'passive' as contrasted with the other which is 'active'; they may be equal, or there may be a difference in degree so as to classify one as 'primary' and the other 'secondary.' There may be a contract in effect between employer and shipowner which may provide the basis for a claim of indemnity founded on express or implied obligations arising thereunder."

Footnote 10:

"10. The concept of 'fault' or 'negligence' by the employer, in this connection, is unsatisfactory, for the tort duty of the employer to the employee has been eliminated by statute. But the decisions make it impossible to avoid use of the term 'negligence' or its equivalent; although the cases here discussed do not, for the most part, observe any distinction, the term should more accurately be used to describe that conduct which would constitute a breach of duty in the absence of statutory immunity."

In *McFall v. Compagnie Maritime Belge* (1952), 304 N.Y. 4, 328-332, 107 N.E. 2d 463, 471-473, it was pointed out at the stevedoring contractor entered into an agreement ith the shipowner to perform loading operations and it was ıder obligation to perform that work in a careful and pru-ent manner. The court stated, however, that the cases tablished the principle that even in the absence of an press covenant of indemnity, the shipowner had the right recovery if the evidence was such as to establish the evedore as the primary wrongdoer.

Even aside from liability based on contract alone, if com-on-law principles of indemnity become relevant to the sues of this case, once a contract relationship between the arties is established indemnity will lie on a tort basis

where the stevedore's fault is primary. *Crawford v. Pope & Talbot, Inc.,* 206 F.2d 784 (3rd Cir. 1953)

> "The right to indemnity can arise by virtue of an express contract, or such a right may be raised from the circumstances surrounding the contractual relationship between the employer and the third party. In either case, the indemnitee has a claim which is independent of, and does not derive from, the injury to the employee except in a remote sense not within the provisions of section 5." (Longshoremen's and Harbor Workers' Compensation Act.)

Accord:

Brown v. American Hawaiian Steamship Co., supra.

As pointed out above, there is some suggestion in the cases preceding the *Ryan* case that a comparison of fault is relevant to the issues before the court. If this is so, the trial court below has suggested a severe limitation on the right to indemnity representing a serious departure from the generally accepted common-law view.

Even if, as suggested by the trial court, the shipowner here is chargeable with something more than liability without fault, he can be found guilty of no more than passive or inactive negligence (Finding No. 12). The proximate, primary, or active cause of the injury was the negligence of appellee. The courts have been precise in setting forth the conditions under which indemnity may be found in such cases. It is stated in *Davis v. American President Lines, Ltd.,* 106 F. Supp. 729 (N.D. Cal. 1952), at 730 that:

> "Both the common law and admiralty courts have recognized a right to indemnity as distinguished from contribution in a person who has responded in damages caused by the wrong of another. This right has been recognized in *two general classes of cases—those in*

which the person seeking indemnification was without fault and those in which such person was passively negligent, but the primary cause was the active negligence of another." (Italics ours.)

The court below appears to concede this first basis of liability but since it found passive negligence on the part of the shipowner appellant (Finding of Fact No. 12) denied liability under the second class of cases. This was error.

This second basis also finds support in section 97 of the *Restatement of Restitution,* where it was said:

> "A person whose negligent conduct, combined with the reckless or intentional wrongful conduct of another, has resulted in injury for which both have become liable in tort to a third person is entitled to indemnity from the other for expenditures properly made in the discharge of such liability, if the other knew of the peril and could have averted the harm at a time when the negligent tort-feasor could not have done so."

See also *Lukasiewicz v. Moore-McCormack Lines,* 104 F. Supp. 572 (E.D. N.Y. 1952); *Raskin v. Victory Carriers,* 124 F. Supp. 879 (E.D. Pa. 1953). In this latter case, it was stated:

> "In the McFall case the court said that such implied contract of indemnity will arise in favor of the wrongdoer who has been guilty of passive negligence, if there be such, against the one who has been actively negligent."

In two cases decided in this circuit it was held that for the stevedores knowingly to make use of defective gear aboard the vessel and supplied by the shipowner constitutes an active, or primary and superseding cause of the injury occasioned thereby.

> *United States v. Arrow Stevedoring Co.,* 175 F.2d 329, 331 (9 Cir. 1949)

"On the facts we find that the sole proximate cause of the injury to Williams was the negligence of Arrow in its use of the door with knowledge of its defects of dogs and pins. The government (shipowner) in no way participated in the wrongful use of the door, which otherwise would have been made secure in the usual manner described * * *"

United States v. Rothschild International Stevedoring Company, 183 F.2d 181 (9th Cir. 1950)

where the court quotes with approval from The Mars, 9 F.2d 183, 184, (S.D. N.Y. 1914) as follows:

"* * * where one of the wrongdoers completes his wrong, and the subsequent damages are due to an independent act of negligence, which supervenes in time, and which has as its basis a condition which has resulted from this first act of negligence * * * we say that the consequences of the first act of negligence did not include the consequences of the second.

"The Restatement of Torts Sec. 441 is to the same effect: '(2) The cases in which the operation of an intervening force may be important in determining whether a negligent actor is liable for another's harm are usually, but not exclusively, cases in which the actor's negligence has created a *situation harmless unless something further occurs, but capable of being made dangerous by the operation of some new force and in which the intervening force makes a potentially dangerous situation injurious.* In such cases, the actor's negligence is often called passive negligence, while the third person's negligence which sets the intervening force in active operation, is called active negligence.' " (Italics ours.)

Based on the foregoing principles, the court granted indemnity for injury to a stevedore arising from a defective winch

which had been twice reported to the shipowner by the employer, indemnity being based on the principle that although both were negligent, the employer permitted his employee to continue working in face of the danger and was therefore guilty of an independent act of negligence supervening in time.

Accord *Raskin v. Victory Carriers, Inc., supra,* where it was held that, where a dangerous condition on a vessel has been created by the negligence of the shipowner, it is active negligence for the contracting stevedore knowing of the dangerous condition to permit its employees to work on the ship and relying on the chance that nothing would happen, and shipowner is entitled to indemnity.

The record is replete with evidence of the extraordinary careless conduct of appellee's employees, who, apprehending the peril presented by the hatch beam with its missing lock, nonetheless continued to load No. 1 lower hold as if the danger were not present. Thus balanced against the fault or neglect, if any, of the shipowner we find a series of acts and omissions on the part of appellee's employees which denote negligence of the grossest sort. In the present case a combination of factors clearly shows that the principal fault lies with the stevedores. Each supervisory employee of appellee, aware of the danger, had it within his power to avert the catastrophe which befell Williams. Taken singly, the actions of each were without any reference to any reasonable standard of care, taken collectively a causal chain was forged which became the sole, primary or active cause of the injury to Williams.

The trial court could not have regarded the appellant and appellee here completely *in pari delicto* for as stated in its opinion,

> "The evidence clearly shows that plaintiff's negligence was passive and that defendant continued its work with knowledge of this dangerous condition. Therefore defendant's share of the responsibility would be greater for the damages which ensued." *American President Lines v. Marine Terminals Corp.,* 1955 A.M.C. 1879.

In the infinite variety of circumstances where indemnity has been sought the courts have used various terms to distinguish between the grade of fault attributable to the participating wrongdoers so as to justify the imposition of the entire loss on the one who is regarded as the principal offender. The acts of the parties are variously contrasted as positive or negative, see *Washington Gas Light Co. v. District of Columbia,* 161 U.S. 316 (1896) and as active and passive in others. See *Gray v. Boston Gas Light,* 114 Mass. 149 (1892). Whatever the terminology, the inquiry is always whether the difference in the gravity of fault of the participants is so great as to throw the whole loss upon one. We submit that even if some negligence is attributable to appellant such an inquiry in this case will compel stevedore appellee to indemnify shipowner appellant.

It has been aptly demonstrated that the beam in question was made dangerous by the activities of the stevedore company and by its deliberate recklessness in continuing to work in the face of a danger clearly apprehended by its supervisory employees. This was an intervening or superseding event, constituting the active or primary cause of the injury to Williams. The peril was known to appellee's employees, and could have been averted by them. American President Lines employees participated in no activity relative to this beam once the stevedores were aboard the vessel. It was appellee, not appellant, that knowingly proceeded

vith loading cargo under this unlatched beam and hooked the bridle into it, dropping it to the hold below.

It is therefore submitted that the lower court erred as outlined in Specifications 7, 8 and 9, and instead should have ordered indemnity of shipowner appellant by stevedore appellee whose negligence was the primary and active cause of the injury.

IV.

INDEMNITY, NOT CONTRIBUTION, STILL PERMITTED UNDER HALCYON V. HAENN, AMERICAN MUTUAL V. MATTHEWS

A. Summary of Argument.

The principles enunciated in the cases of *Halcyon Lines v. Haenn Ship Refitting Corp.* and *American Mutual Liability Insurance Co. v. Matthews,* relied upon by the trial court in its conclusions of law do not support the conclusions reached therein, but to the contrary support recovery by appellant in its suit for indemnity. Further, *States Steamship Co. v. Rothschild International Stevedoring Co.* relied upon by the trial court does not foreclose recovery by appellant (Brief Section IV, Specification of Error No. 10).

B. Specification of Error 10.

> "The Court erred in conclusion of law No. 5 in applying the law of *American Mutual Liability Insurance Co. v. Matthews,* 182 Fed. 2d 322 (2d Cir. 1950), and *Halcyon Lines v. Haenn Ship Refitting Corp.,* 342 U.S. 282 (1952) to the facts of this case."

The court below ignored the contractual relationship between the parties to this litigation and the fact that the present suit is one for indemnity, rather than contribution, resting its decision on *Halcyon Lines v. Haenn Ship Refitting Corp.,* 342 U.S. 282 (1952), and *American Mutual Liability Insurance Co. v. Matthews,* 182 F.2d 322 (2d Cir.

1950). It is true that the *Halcyon* case negated the right of contribution between joint tort feasors in non-collision admiralty cases; yet that holding, and the cases subsequent to it, did not foreclose the right of a shipowner to be indemnified by the stevedore. The *Halcyon* case has been universally interpreted to distinguish indemnity from contribution. The core of the *Halcyon* case is expressed in the court's conclusion that "it would be unwise to attempt to fashion new judicial rules of contribution". This does not bar the enforcement of an independent claim for indemnity, whether or not that claim is based upon a contractual relationship. *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corp.,* supra. *Crawford v. Pope & Talbot, Inc.,* supra.

This conclusion was also reached by Judge Carter of this district in his memorandum opinion denying appellee's motion in this case to dismiss the instant complaint. There the court disposed of the contention that the *Halcyon* case was controlling in an indemnity case of this nature. *American President Lines v. Marine Terminals Corp.,* 128 F. Supp. 603 (N.D. Cal. 1955).

The case of *American Mutual* does not lend support to the decision of the trial court. That case is distinguishable on its facts and was based on contribution not indemnity. In that case, the shipowner supplied a defective rope without inspecting it, and the stevedores used it, also without inspection, although the defect would have been revealed had inspection been made. Plaintiff longshoreman suffered injury as a result. On these facts, the shipowner responded in damages and brought suit for contribution. The court denied recovery based upon the *Halcyon* case. The court also affirms there that where a contractual relationship exists between the shipowner and the stevedore and the

primary cause of the injury to the longshoreman is the breach of the contractual duty owed by the promisee to do the work properly and safely, recovery may be permitted on an indemnity theory. The court pointed out that the stevedore there had no contractual duty to detect defective equipment supplied by the shipowner and did not in fact know of the danger. Contrast the facts there with the present case, where the contract provided appellee would remove beams, and perform its work safely and efficiently and where the missing safety latch was discovered by appellee's longshoremen, the danger recognized, and safe alternatives ignored by them.

See Weinstock "The Employers Duty to Indemnity Shipowners for Damages Recovered by Harbor Workers," 103 U. of Pa. L. Rev. 321 at 330 and 337 for a further discussion of the *American Mutual v. Matthews* case.

To the extent the court below relied upon the case of *States Steamship Company v. Rothschild,* 205 F.2d 253 (9th Cir. 1953) it does not support the conclusion that indemnity is allowable only where the ship is unseaworthy and the owner not negligent. This case was cited by the court below for the theory that the shipowner may recover in liability only where he is liable without fault as the result of another's act, unless a specific contractual indemnity provision is present. This view is demonstrably false. The court in the *States* case, it is true, considered the shipowner's allegation that it was liable without fault only because of its non-delegable duty to supply a seaworthy ship and a safe place in which to work, the court holding this stated a cause of action for indemnity. The court there, in so doing, however, did not negate the right to indemnity where the indemnitee is passively negligent, but the primary cause of the loss was the act of negligence on the part of another. It is

essential too to limit that case to its peculiar facts. There the court was confronted with the relationship between a stevedore employed, not by the shipowner, but by a space charterer, the United States Army. Thus there was no contractual relationship there between the shipowner and the stevedore. The court, in *States Steamship Company v. Rothschild,* supra, specifically distinguished those situations where either (1) there was an express indemnity provision or (2) where there was a contractual relationship between the putative indemnitor and indemnitee such as exists here.

In view of the contractual relationship here the court should have permitted indemnity even aside from the *Ryan* case on the common law basis of one passive tort feasor and one active tort feasor, as set forth in Section III.

V.

FINDINGS OF FACT AND CONCLUSIONS OF LAW CONFLICT, ARE UNSUPPORTED BY THE EVIDENCE, AND DO NOT SUPPORT THE JUDGMENT BELOW.

A. Summary of Argument.

Conclusions of Law 1, 2 and 5, all to the effect that appellant was jointly and concurrently negligent with appellee, and Conclusion of Law 4, that appellant's concurrent negligence went well beyond a mere passive act of negligence, are unsupported by evidence or by any findings of fact. Said conclusions are further inconsistent with Findings of Fact Nos. 3, 4 and 5 and conflict with Finding No. 12.

While we recognize that the reviewing court does not review evidence as an original fact-finding tribunal or settle conflicts in evidence, the review court does not accept findings either clearly erroneous or unsupported by the evidence nor respect conclusions of law which do not rest properly

on the facts so found. It is thus open to this court to decide whether findings are supported by the evidence and whether the evidence gives the requisite support to the conclusions reached. *Compagna Corporation v. Harrison,* 114 F.2d 400 (7th Cir. 1940).

If the ultimate finding of a court is contrary to evidentiary findings or based upon a misapplication of the law to evidentiary findings, it is not binding upon the appellate court. *United States v. Armature Rewinding Co.,* 124 F.2d 589 (8th Cir. 1942).

There are inconsistencies and conflicts between certain findings and conclusions which warrant reversal of the judgment, entirely aside from the arguments presented in Sections I, II, III and IV of this brief.

B. Specifications of Error Nos. 11, 12, 13, 14 and 15.

SPECIFICATION OF ERROR NO. 11:

> "The Court erred in that conclusion of law No. 4 conflicts with finding of fact No. 12."

SPECIFICATION OF ERROR NO. 12:

> "The Court erred in that the findings of fact are insufficient to support conclusion of law No. 4."

SPECIFICATION OF ERROR NO. 13:

> "The Court erred in that conclusions of law Nos. 1, 2, 4, and 5 are inconsistent with finding of fact No. 12 and are not supported by the evidence or any finding of fact."

SPECIFICATION OF ERROR NO. 14:

> "The Court erred in that there is no evidence or finding to support conclusion of law No. 2, that the shipowner knowingly supplied or knew that a particular hatch beam lacked a locking device."

SPECIFICATION OF ERROR NO. 15:

> "The Court erred in that the findings of fact are insufficient to support conclusions of law Nos. 1 and 2 that plaintiff and defendant were jointly and concurrently negligent and said conclusions are contrary to the findings of fact."

Conclusions of law Nos. 1, 2 and 5 mention joint and concurrent negligence of both parties. Conclusion of law No. 2 defines joint and concurrent negligence on the part of both parties in that

> "the shipowner knowingly supplied a hatch beam totally lacking a locking device; and both of said parties with full knowledge of said lack of a locking device permitted the unloading and loading operations to be performed, without repairing or replacing said locking device, or without removing said hatch beam."

We submit that neither the findings nor the evidence support this conclusion. Compare conclusion No. 2 with the following findings of fact.

> *Finding of Fact No. 3:* "That at the time of the arrival of said vessel in San Francisco, and prior to the defendant going aboard for the purpose of discharging the vessel's cargo, there was a missing locking device on the number 2 King strongback in the lower 'tween deck hatch.
>
> *Finding of Fact No. 4:* "That the plaintiff knew and was aware of the absence of locking devices on some of the strongbacks on the vessel and communicated this information to the defendant."
>
> *Finding of Fact No. 5:* "That plaintiff's chief officer had on January 29, 1952, communicated to defendant's walking boss, Ernest Bleile, a warning that some beams aboard the vessel might lack locking devices and cautioned him to remove any defective beams."

Finding No. 3 is based upon a stipulation between counsel as follows:

> "Mr. Gerhardt: Your Honor, we have a stipulation that prior to the accident and the injury to Mr. Williams the safety latch on one end of No. 2 beam, No. 2 strongback, in the lower 'tween deck, was missing.
>
> The Court: So stipulated?
>
> Mr. Taylor: So stipulated.
>
> Mr. Gerhardt: That stipulation, however, Your Honor, is not a stipulation that the plaintiff knew of the missing latch." (Tr. 103)

> "Mr. Gerhardt: We have stipulated this was missing and the ship was unseaworthy in that regard." (Tr. 168)

Findings Nos. 4 and 5 are based upon the testimony of walking boss Bleile as outlined under Section II of the brief, Subsection B. There is no other finding and no evidence whatever to show knowledge of the shipowner either that the device was missing from a particular hatch beam or that the shipowner permitted work to continue under hatch beam No. 2 with knowledge of this particular dangerous condition. The evidence is (Tr. 289) that the first mate of the vessel had called to the stevedore's attention there might be locks missing on some beams and warned defendant to be on the lookout for defective beams and to effect removal of excess beams. There is no evidence or finding to show the shipowner condoned or participated in the stevedore's subsequent negligent acts after the stevedores employees found the lock missing from No. 2 beam.

It is true there is a finding, No. 11 (Tr. 34), that the shipowner had a duty to supply, repair and maintain locking devices, but there is no evidence and no finding that the stevedore's employees who found the missing lock called it

to appellant's attention or that appellant was in any way aware of the dangerous condition under which work was proceeding in No. 1 hold.

Thus there is no support, no foundation, no basis, for the reference to joint and concurrent negligence in conclusions of law Nos. 1, 2 and 5. Neither is there any evidence or finding to support conclusion of law No. 4 which provides as follows:

> *Conclusion of Law No. 4:* "That the concurring negligence of the shipowner went well beyond a mere passive act of negligence based on its non-delegable duty to furnish a seaworthy ship and a safe place to work."

We have searched the record in vain for any facts supporting knowledge on the part of the shipowner that beam No. 2 was defective or if it had such knowledge of any facts showing any knowledge of the shipowner or permission on its part that loading and unloading operations were to be performed under such conditions or any facts supporting the conclusion that the shipowner's negligence (if it was negligent) went beyond a mere passive act of negligence. Not only is there no such evidence but finding No. 12 is in complete conflict with conclusions Nos. 1, 2, 4 and 5.

> *Finding of Fact No. 12:* "That plaintiff's negligence was passive and that the defendant continued to work with the knowledge of the dangerous condition of the defective strongbacks." (Tr. 34)

In view of a complete absence of evidence and in light of Finding of Fact No. 12, Conclusions of Law Nos. 1, 2, 4 and 5 were improper and unsupported in concluding that appellant and appellee were jointly and concurrently negligent and that the negligence of the respective parties combined to cause the injuries to Williams.

As we have demonstrated, recovery on an indemnity theory may be had where one joint tort feasor is guilty of passive negligence and the accident results from the active or primary negligence of another. Assuming, without conceding, that appellant was negligent and knew of the defective beam this negligence was of the passive sort but with appellee continuing its work knowing of the danger according to Finding of Fact No. 12 and therefore appellant's right to indemnity is not destroyed.

The conflict between the findings of fact and conclusions of law suggests the court has adopted an erroneous rule that indemnity will not be allowed to a party guilty of any negligence whatsoever, and that as long as a party is guilty of any negligence at all, no matter how slight, it becomes a joint concurring tortfeasor irrespective of any comparative or relative fault or of the fact that its negligence may only be passive and the negligence of the other may be active. We have shown above under Section III of this brief that the courts will balance the negligence of one tortfeasor as against the other in reaching a conclusion as to whether indemnity should be awarded.

Conclusion

A. On the basis of the breach of the stevedore's contractual obligations to perform its work safely, express and implied, recovery for indemnity should be awarded to appellant.

B. Alternatively, indemnity should be awarded appellant on the basis that it was liable without fault, and the cause of the accident was the sole negligence of appellee.

C. Alternatively, indemnity should have been awarded on the basis that appellant was passively negligent while appellee was primarily or actively so.

D. The conclusions of law are so clearly erroneous, and there is such substantial conflict between the conclusions and findings that the judgment below should be reversed.

For the foregoing reasons it is respectfully submitted that the Judgment of the District Court should be reversed and indemnity awarded to appellant American President Lines, Ltd.

Dated: San Francisco, California, March 1, 1956.

Respectfully submitted,

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